A18-0205

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

NIGERIA LEE HARVEY,

Appellant.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. Were the cell phone records appropriately obtained from an Order that found probable cause existed to believe the disclosure of the records would result in evidence tending to show a particular person has committed a crime?

The Order authorizing disclosure of the phone data found probable cause existed and, thus, complied with the U.S. Supreme Court's mandate even though *Carpenter* had not yet been decided. Add.1-4.[1] If any question exists, the good faith exception saves the evidence.

Authorities:

- *Carpenter v. United States*, 138 S. Ct. 2206 (2018).
- *State v. Sorenson*, 441 N.W.2d 455 (Minn. 1989).
- *United States v. Leon*, 468 U.S. 897 (1984).

II. Was a *Frye-Mack* analysis required and, if so, did the district court[2] err or abuse discretion in determining the cell phone evidence satisfied the general acceptance and foundational reliability prongs?

The district court properly concluded, a *Frye-Mack* analysis was unnecessary because the evidence was neither "novel," nor "scientific." Add.39-40. Nonetheless, the district court did not err or abuse its discretion conducting the *Frye-Mack* analysis and denying the motion to suppress. Add.30-37, 41-43.

Authorities:

- *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000).
- *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510 (Minn. 2007).
- *State v. Loving*, 775 N.W.2d 872 (Minn. 2009).

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[1] "Add." refers to Appellant's Addendum; "T." to trial transcript; and "S.T." to the November 7, 2017 sentencing transcript.

[2] The Honorable Fred Karasov presided over all relevant proceedings.

III. Did the trial court clearly err in denying Appellant's *Batson*'s challenge?

No. The trial court did not clearly err in denying Appellant's *Batson* challenge because defense counsel had not made a prima facie showing of purposeful discrimination, especially given the State had already accepted one African-American juror for the panel. Add.44-49; T.362-63, T.346-47. The court also did not clearly err in finding the State had articulated a race-neutral reason for the peremptory strike: the prospective juror believed police lie and thought being robbed at gunpoint was not significant. Add.49; T.361-63.

Authorities:

- *Batson v. Kentucky*, 476 U.S. 79 (1986).
- *State v. Wilson*, 900 N.W.2d 373 (Minn. 2017).
- *Angus v. State*, 695 N.W.2d 109 (Minn. 2005).

IV. Does Appellant's pro se supplemental brief raise any meritorious issues?

No. Appellant's cell phone arguments are repetitive of the opening brief. *See* Supp.Br.2-8. In addition, the ineffective assistance of counsel and prosecutorial misconduct—based upon the same cell phone evidence—were not presented below and also fall short.

Authorities:

- *State v. Doppler*, 590 N.W.2d 627 (Minn. 1999).
- *State v. Ramey*, 712 N.W.2d 294 (Minn. 2006).

STATEMENT OF THE CASE AND FACTS

Appellant Nigeria Lee Harvey was charged with second-degree murder and possession of a pistol by a prohibited person. *See* Index #1. A grand jury later indicted Appellant on charges of first-degree premediated intentional murder and first-degree attempted intentional murder. Index #21.[3] The jury convicted Harvey of the completed first-degree and attempted first-degree premediated intentional murder, but acquitted him of the aggravated robbery charges. Index #111-14; T.1478. Appellant received the mandatory sentence: life in prison without the possibility of parole. S.T.10-12; Index #116.

A. A.A. introduced O.J. to the drug business

A.A. and O.J. grew up together and were close friends, "like brothers." T.790-91. A.A. described O.J. as fun, spontaneous, and outgoing. T.792.

A.A. introduced O.J. to the drug business. T.794-95. A.A. obtained drugs from suppliers, sold or "fronted"[4] the drugs to dealers, and then dealers would sell to end-user customers. T.806; T.1245-51. O.J. began selling drugs that A.A. provided. T.794. In the summer of 2015, O.J. introduced A.A. to Harvey, who also sold drugs to end-users. T.794-95; T.1244-45.

[3] The charges also included first-degree intentional (and attempted) murder while attempting an aggravated robbery. Index #21.

[4] "Fronted" meant a loan of sorts, where A.A. would provide the drugs to the dealer with the expectation that the dealer would pay A.A. money after the drugs were sold. T.806; T.1246-54.

B. Harvey upset with O.J. over a woman and drug deals

Harvey became upset with O.J. over a woman that Harvey had previously dated and who sold drugs for him. T.769-98; T.800-05. Once she left Harvey and began dating O.J., she started selling drugs for O.J. instead. T.798-T.800. The fact she was selling for O.J. "messed [Harvey's] money up[.]" T.804-05.

About two weeks before the shooting, Harvey told A.A. that O.J. should know better because Harvey was "good with the hands [fists] and good with the pistol." T.801. At the time, A.A. did not think Harvey was serious. T.804.

C. Harvey avoided A.A. because Harvey owed him money

In July 2015, Harvey owed A.A. money for drugs that A.A. had fronted him. T.805-06. Late on July 26, Harvey was not answering A.A.'s calls. T.807-08. A.A. had O.J. call Harvey from O.J.'s phone, and Harvey answered. *Id.* Harvey told A.A. that he was in Minneapolis near Morgan and 34th Street. *Id.*

A.A. and O.J. drove to that location to wait for Harvey. A.809. While sitting in the car, A.A. and O.J. smoked marijuana, drank, and joked around. T.809-10, T.813. Neither A.A., nor O.J. had weapons on them. T.815; T.1318.

D. Harvey entered car; shot A.A. in the ear; O.J. murdered

A Chevy pulled behind A.A., which he knew was Harvey's car. T.810-12; T.851. The silver Malibu had "Car Hop" plates and temporary stickers. T.796.

Around midnight on July 27, Harvey entered the back seat of A.A.'s car. T.812-14; Ex.144. Harvey shuffled some cash, claiming to be getting the money together. T.814. A.A. turned his head as O.J. said something funny, then heard a

loud "pop" when he was shot in his head. T.814-16. A.A., having been shot in his ear, began bleeding and laid still as he went numb. *Id.* A.A. felt somebody go into his left pocket and take all the money ($2,770) he had on him. *Id.* Harvey was aware that A.A. normally kept large sums of money in his left pocket. T.847-48.

E. Several shots outside of car; O.J. drives himself to hospital

A.A. then heard a different voice—not Harvey—say "where'd he go," and then heard five more shots. T.815; T.834. The additional shots startled A.A. T.818. A.A. sat up, put the car in drive, and sped towards the hospital. T.818. A.A. felt like he was dying, with blood "running down [his] shoulder like warm water." *Id.*

F. After surgery, A.A. identifies Harvey as the shooter

Once at the hospital, A.A. recalls being asleep in a matter of seconds. T.823. A surgeon removed the bullet in A.A.'s ear, which lodged in his jaw. T.998-T.1001; T.1128-36; Exs.143, 146-48. When he woke up, the police were in his hospital room. T.824. A.A.'s immediate concern was for his friend. T.973-75. Officers informed A.A. that O.J. had been murdered. T.824. A.A. began to cry. T.973-75.

In a recorded conversation, A.A. identified Harvey as the shooter. T.824-25; T.974-76. A.A. described the barrage of shots he heard. T.977. He also described Harvey's vehicle by the "Car Hop" plates and the temporary license stickers. *Id.*

A.A. admitted lying to the police about the drugs found in his rectum – claiming the shooter must have planted the drugs. T.840-45. A.A. also lied about the reason that Harvey owed him money – feigning it was for a gambling debt. *Id.* A.A. lied because he wanted to avoid jail for being a drug dealer. T.845; T.852.

G. Police arrest Harvey

On July 28, 2015, the police conducted surveillance on Harvey. T.860-62. Once Harvey saw the police, he abruptly walked the other way. *Id.* Harvey gave the Officer a false name and did not comply when told to get on the ground. *Id.*

Harvey tried to escape after police detained him. T.863. Harvey was carrying a .45 handgun at the time the police arrested him. *Id.*; T.1305.

H. Police investigate

1. Medical examiner's autopsy

The medical examiner's office performed an autopsy of O.J. and determined he had been shot several times and the manner of death was a homicide. T.912-27. Several shots were, by themselves, fatal. T.918-19, T.924-25.

2. Police processed the scene, investigate bullets and gunshots

Officers photographed the scene, the discharged cartridge casings, and the vehicle in which A.A. and O.J. were shot. Exs.2-11, 13-51; T.866; T.878-89.

A forensic scientist analyzed the discharged ammunition casings found at the scene. T.1040-49. Nine casings were fired from the same 9-milimeter firearm. *Id.* Bullets found inside A.A. and O.J. came from a .38 revolver firearm. T.1052-56. O.J.'s body also contained bullet fragments from a 9-milimeter. T.1053.

The shots fired activated the ShotSpotter technology, which detects and records gunshots. T.930-39. SpotShotter recorded eleven gun shots just past midnight on July 27, 2015 in the area of 33rd / 34th Avenue and Morgan. *Id.*; Ex.95. The audio of the first two shots were fainter compared to the following nine. *Id.*

3. Officers investigate the silver Malibu

Police found the 2003 silver Chevy Malibu with "Car Hop" temporary license plates. T.868. The vehicle was registered to Harvey's girlfriend. T.876-77; T.1158-59.[5] A potential blood-like substance was found on the vehicle's tires.[6] T.905-09; Exs.80-85; T.1012-15.

The interior rear door of the vehicle in which O.J. and A.A. were shot found a mix of DNA from four or more individuals. T.901, T.1077; Exs.94-79. Harvey's DNA could not be excluded from that mix, although only 19.4% of the population could be excluded. T.1077. Harvey's DNA was found inside of the Chevy Malibu, where 99.7% of the general population's DNA could be excluded. T.1079.

Surveillance video cameras near the murder scene captured a vehicle with temporary stickers in the upper left-hand corner of the window driving away from where the shooting had occurred. T.979-90; Exs.99-139. The surveillance video recorded between July 26 at 11:50 p.m. and July 27 at 12:20 a.m. T.980-81.

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[5] Harvey's girlfriend claimed the car was not the same vehicle in the photos because she recalled her car had a crack in the windshield. T.1183-89. She further claimed her vehicle was in her garage at the time of the murder. T.1164. But she did not demand her car back from the police in the two years after it was impounded (saying they had the wrong vehicle) or even disclose her story to anyone until after she met with Harvey on October 25, 2017 (after jury selection had begun). T.1166-70.

[6] The vehicle's tires were sprayed with a chemical that illuminates blood. T.1015-21. The forensic scientist noted the blood may have come from the scene, but conceded it could have come from critters or created a false positive. *Id.*

4. Police investigate O.J.'s phone

O.J.'s phone showed he had communicated with a specific phone number ([redacted]) twice before he was killed. T.995. The contact for the number was saved as "NAG." *Id.* The police later learned that specific phone number belonged to Harvey. T.997; T.1137.[7]

I. Police obtain court Order—with a finding "there is probable cause to believe that a crime has been committed"—for cell phone company to produce records from a particular cell phone number

Based upon the last number that called O.J.'s phone, police filed an application and affidavit to obtain the cell phone records from that specific phone number. Add.1-5. The Officer's affidavit discussed the homicide investigation and his belief that the suspect used the cell phone "as the means of committing a crime[.]" Add.1. The Officer further stated the facts and circumstances "establish probable cause to believe that a crime has been or is being committed[.]" *Id.* The affidavit also noted A.A. had "positively identified Nigeria Lee Harvey" as the person who shot A.A. in the head and the person who O.J. talked to on his cell phone prior to the murder. Add.2. The Officer requested the court direct Sprint Communications—the provider for [redacted]—to disclose the records. Add.3.

Based upon the Officer's application and affidavit, the court ordered Sprint to disclose the records. Add.4. The court found "there is reason to believe the information likely to be obtained by such disclosure is relevant to an ongoing

[7] At trial, the parties stipulated the number was registered to Harvey during the time period between July 26 and 27, 2015. T.1137.

[homicide] criminal investigation[.]" *Id.* The court further concluded "there is probable cause to believe that a crime has been committed and that a particular person has committed a crime" and that disclosing the records "will result in discovery of evidence which tends to show a crime has been committed or tends to show that a particular person has committed a crime." *Id.*

A member of the FBI's cellular analysis survey team—Special Agent James Berni— analyzed the records from Harvey's phone. T.1086-91; Ex.167. The Agent reviewed the call detail records, which show when specific devices are on a network. T.1092. Agent Berni used the phone tower list—with exact locations of each tower—combined with the phone records to determine the general location of where the phone was when it interacted with the cell phone network. T.1092; Exs.169-70.

From that data, Agent Berni was able to determine the geographical location of where Harvey's phone was located when making calls on July 26 and July 27. Exs.172-73; T.1097-T.1109. The Agent mapped the phone's approximate location prior to the shooting (T.1097-T.1100), and after the shooting, which included activity in St. Paul and later back to Minneapolis. T.1102-07; Exs.178-83. Agent Berni learned that the homicide occurred at 12:06 a.m. on July 27 at the intersection of 34th and Morgan. T.1098. From his investigation, the Special Agent concluded Harvey's phone was used within the crime scene area at 12:03 a.m. and 12:08 a.m. on July 27, 2015. Ex.176; T.1101.

J. District court denies *Frye-Mack* motion

After two *Frye-Mack* hearings,[8] the district court denied Harvey's motions to exclude the cell phone location evidence and expert testimony. Add.6-43. Following detailed findings of fact (Add.8-26), the court concluded the cell phone location evidence and FBI Special Agent testimony was admissible. Add.26. Specifically, the court concluded Agent Berni was qualified, his opinion had foundational reliability, and the testimony would assist the jury. Add.29-38. The court further concluded the methodology and techniques were accepted in the law enforcement and cellular phone industry communities. Add.38-43.

K. Trial testimony

A.A. identified Harvey as the person who shot him. T.793. Harvey's version of events (T.1300) was largely consistent with A.A.'s testimony: Harvey owed A.A. money for drugs (T.1244-60); O.J. called Harvey's cell phone and A.A. was on the line (T.1256-61); Harvey told A.A. where he was located (*Id.*).

Harvey's story diverged from A.A.'s testimony at the point when O.J. and A.A. arrived 34th and Morgan. T.1261-81. According to Harvey, he and another individual went out to sell drugs so Harvey could pay A.A. T.1262-63. Harvey claimed to get into a black vehicle and drive to St. Paul to sell drugs. T.1264-67. Harvey asserted he went back to his friend's house after selling drugs. T.1267-70.[9]

[8] 9/15/17 T.1-147; 9/29/17 T.1-30.

[9] A friend claimed Harvey left a house after midnight on July 27, 2015. T.1196. But, like the girlfriend's testimony, the friend's story was not revealed until he talked to Harvey after jury selection had begun (on October 25, 2017). T.1204-13.

Harvey testified he was not at the scene of the murder. T.1280-81. But he admitted the cell phone testimony was accurate as to his locations. T.1302. And when asked whether A.A. and O.J. had weapons on them the night of the murder, Harvey responded: "From what I observed, I believe they didn't." T.1318.

Harvey also admitted that he wrote a letter while in jail to encourage a friend to talk to A.A. and convince him not to testify at Harvey's trial. T.1276-79. The letter encouraged this friend to "slide on" A.A. and have a "real n***a" talk with him. *Id.* Harvey claimed the letter was not meant to threaten A.A. *Id.* Harvey promised he could deliver guns to A.A. in return for not testifying. T.1278-79.

L. Jury finds Harvey guilty; court sentenced him

The jury found Harvey guilty of first-degree premediated intentional murder of O.J. and first-degree premediated attempted intentional murder of A.A. T.1478; Index #111-14. The jury acquitted Harvey of the first-degree murder charges "while committing aggravated robbery." *Id.* Harvey received the presumptive sentence: life in prison without the possibility of parole. S.T.10-12; Index #116.

Harvey filed a timely notice of appeal. Index #120.

ARGUMENT

I. The phone records were appropriately obtained and properly admitted

A. Standard of review

This Court reviews a district court's factual findings in a pretrial motion to suppress order for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). The district court's legal determinations—including for probable cause—are reviewed *de novo*. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012).

B. No Fourth Amendment violation and evidence properly admitted

The Order authorizing law enforcement to obtain Harvey's cell phone records included a probable cause finding. Add.4. Thus, the police had already complied with the new rule the Supreme Court recently announced in *Carpenter*.[10]

In *Carpenter*, the Supreme Court concluded that the acquisition of Carpenter's cell-site location information was a search and, therefore, "the Government must generally obtain a warrant supported by probable cause[.]" 138 S. Ct. at 2221. The Government had obtained the records pursuant to a court order under the Stored Communications Act. *Id.* The Act merely required "'reasonable grounds' for believing the records were 'relevant and material to an ongoing investigation.'" *Id.* (citing 18 U.S.C. § 2703(d)). "That showing"—the evidence

[10] At the time Harvey filed his motions attacking the cell phone records, data, and analysis, the United States Supreme Court had not yet decided *Carpenter*. Index #50-52, 55, 61-63; *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Defense counsel did, however, move to suppress the evidence as having been "obtained as the result of an unlawful warrantless search and seizure[.]" Index #79.

"might be pertinent to an ongoing investigation"—fell "well short of the probable cause" standard. *Id.* Or, as the Government in *Carpenter* had previously described it: "a 'gigantic' departure from the probable cause rule[.]" *Id.* Since no probable cause finding had been made, the Court reversed and remanded. *Id.* at 2223.

Appellant is correct that at the time the Officer applied for disclosure of the cell phone data, the law did not require a probable cause showing. App.Br.17 (citing statute requiring a belief the records are relevant). Although not required at the time, the Order complied with *Carpenter*'s mandate by finding probable cause supported obtaining the cell phone data. Add.4. Specifically, the Order stated:

> The Court further finds there is probable cause to believe that a crime has been committed and that a particular person has committed a crime and that disclosure of records concerning electronic communication will result in the discovery of evidence which tends to show a crime has been committed or tends to show that a particular person has committed a crime.

Id. That probable cause finding complies with *Carpenter*'s requirement.[11]

This Court affords great deference to a district court's probable cause determination. *State v. Fort*, 768 N.W.2d 335, 342 (Minn. 2009) ("In reviewing an issuing judge's probable cause determination, we give great deference to the judge's decision.") (quotes omitted); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999).[12]

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[11] Appellant contends the probable cause finding "is of no moment" because the Order is "boilerplate." App.Br.19. But nothing below was developed to demonstrate the Order was, in fact, "boilerplate." Even if it were, this Court cannot simply delete the probable cause language. The fact the judge signed the Order, demonstrates the court found probable cause existed to obtain the cell phone data. Add.4.

[12] To be fair, these cases analyzed warrants. Nonetheless, the district court's probable cause determination should be entitled to the same deference.

In order to find probable cause, the "issuing judge need only determine that, based on the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Bradford*, 618 N.W.2d 782, 794 (Minn. 2000) (quotes omitted). "[P]robable cause only requires a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Harris*, 589 N.W.2d 782, 790-91 (Minn. 1999) (quotes omitted).

Appellant declares the affidavit contains "limited language" that does not "amount to probable cause of a nexus between the records and the murder." App.Br.22. But the Officer's affidavit provided a nexus such that the court had a sufficient basis to find probable cause that the phone data would result in evidence that would aid in the prosecution of the murder. Add.1-3.

In his affidavit, the Officer noted the ongoing investigation into the phone number related to a homicide. Add.1. The Officer believed the phone data "is relevant to an ongoing criminal investigation[.]" *Id.* Notably, the Officer's affidavit further believed "the facts and circumstances set forth herein establish probable cause to believe that a crime has been or is being committed" and that "the disclosure of records concerning electronic communications will result in the discovery of evidence which tends to show a crime has been committed or tends to show that a particular person has committed a crime." *Id.*

The Officer detailed his training and experience of using the requested data, which resulted in collecting or identifying evidence as well in the apprehension of suspects. Add.1-2. The Officer then detailed the facts establishing probable cause

that "a particular person has committed a crime[.]" Add.2. The police had found a decedent in the area of [redacted] after officers responded to reports of shots fired. *Id.* Investigators found O.J.'s "black LG cellular phone" on the street near the area where the decedent was found on the sidewalk. *Id.*

A.A. had told police "the last person [O.J.] talked to on his cell phone, just prior to the shooting," was "Najee" who agreed to meet A.A. and O.J. at that location. *Id.* A.A. identified "Najee" as the person who shot him in the head. *Id.* A.A. further recalled O.J. run from the car and A.A. heard multiple gunshots. *Id.* From photos, A.A. "positively identified Nigeria Lee Harvey … as 'Najee." *Id.*

The police examined O.J.'s cell phone and learned of multiple communications immediately prior to the shooting with the number [redacted], which O.J.'s phone had saved with the contact name "Nige." *Id.* The police requested the phone data because it will "tend to demonstrate that [O.J.] had communicated with a person associated with [redacted], prior to [O.J.] being killed at 34th Avenue North & Morgan Avenue North, Minneapolis." *Id.*

Based upon the totality of the circumstances (contained in the Officer's affidavit), the issuing judge had sufficient facts upon which to base its probable cause determination that evidence of a crime would be found within the phone's data. *Bradford*, 618 N.W.2d at 794. The police knew the decedent had communications with the phone number immediately prior to the shooting. Add.1-2. The decedent also had saved the contact for the specific number as "Nige," which is the first four letters of Harvey's first name ("Nigeria"). *Id.* In addition, A.A. had

identified Harvey as the shooter and stated that O.J. spoke with Harvey immediately prior to the shooting. *Id.*[13] Based upon the totality of the circumstances, the court had ample facts to find probable cause that evidence connected to the murder of O.J. would be found in the phone's data. *Bradford*, 618 N.W.2d at 794; *see also State v. Speak*, 339 N.W.2d 741, 745 (Minn. 1983) (probable cause is "to believe that the crime … has been committed … and the [search] will result in the discovery of evidence that will aid in the prosecution of that crime"). At a bare minimum, the affidavit established "a probability or substantial chance" that evidence of "criminal activity" would be found. *Harris*, 589 N.W.2d at 790-91.

Although Appellant is correct that the statute does not require a probable cause determination (App.Br.18-19), the fact that the district court did find probable cause demonstrates that the judge went beyond the statutory mandate when reviewing the application, ordering disclosure of the phone data, and finding probable cause. The district court's probable cause finding in relation to the phone's data met the standard articulated in *Carpenter*. This Court should affirm.

[13] The facts that (1) O.J.'s cell phone showed communications with the specific phone number with a contact listed as "Nige," and (2) A.A. had confirmed that O.J. had communicated with Harvey immediately prior to the shooting, cuts against Appellant's contentions that the affidavit "did not adequately link Harvey to the phone number" (App.Br.21) and "the application did not provide probable cause to link [redacted] to the homicide" (App.Br.22).

C. The statutory appellate arguments were not litigated below

Appellant now argues the search was illegal under Minnesota law because "section 626A.42 is the exclusive statutory means in Minnesota for law enforcement to try to obtain" this cell phone data evidence. App.Br.17, 23-26. Appellant did not, however, make this argument below. This Court should deem the argument forfeited. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (arguments not raised before district court, including constitutional questions, are forfeited); *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (constitutional question not considered when issue not "adequately briefed []or litigated").

At the district court, defense counsel filed numerous motions and briefs. Index ##28, 30, 36-37, 40, 50-52, 55, 61-63, 79, 82, 85, 87-88, 106-107. Many of Harvey's motions attacked the cell phone evidence. *See, e.g.*, Index #30, 40, 50, 62, 63, 79, 82, 85. In all of those motions and briefs, Harvey cited the statutes now raised on appeal in just two pleadings. *See* Index #79, 82. Those pleadings did not make the arguments that Appellant now makes on appeal.

In the notice of motion and motion to suppress, defense counsel noted that Harvey will move to suppress "evidence obtained as a result of the unlawful warrantless search and seizure of cell phone records and data" pursuant to "U.S. Const. Amend. IV; Minn. Const. Art. I, § 10; Minn. Stat. §§ 626A.28, 626A.42 (2014); 18 U.S.C. § 2703 (Stored Communications Act)." Index #79. In the brief in support of the motion, defense counsel again cited the statute in the introduction. Index #82. But in the argument, defense counsel contended the "state statutes

clarify that collection of any electronic communication data involving location information requires a warrant based on a finding of probable cause." *Id.* at p.5 (citing Minn. Stat. §§ 626A.28, 626A.42). Most notably, defense counsel argued

> While [the Officer's] affidavit was titled an order, it contains all the trappings of a search warrant, and because it sought a search explicating protected under both the Minnesota statutes and the Minnesota and United States Constitutions, *it must accordingly be analyzed as a warrant.* Minn. Const. Art. I, § 10; U.S. Const. Amend. IV; Minn. Stat. §§ 626A.28, 626A.42.

Id. (emphasis added). Defense counsel then argued the "search warrant" failed to meet the probable cause standard. *Id.* at pp.5-10.

Defense below not only failed to raise the statutory arguments now asserted on appeal, counsel affirmatively requested the court to analyze the affidavit and Order as if it were a search warrant. *Id.* Thus, Appellant's new arguments related to sections 626A.42 and 626A.28 (App.Br.23-26) have been forfeited as not raised or adequately litigated before the district court. *Roby*, 547 N.W.2d at 357; *Sorenson*, 441 N.W.2d at 457. The focus of this appeal should be those arguments litigated below: whether the cell phone evidence was obtained pursuant to an invalid search warrant in violation of the Fourth Amendment.[14] *See* Index ##79, 82; App.Br.15-23. As argued above, the answer is no; the Officer's affidavit and the court's Order sufficiently established probable cause to obtain the cell phone data. *See supra* I.B.

[14] Defense counsel cited Minnesota's Constitution, but did not advocate for greater protections. Index ##79, 82. Appellant follows this same approach on appeal. App.Br.24 ("the search was unreasonable under article one, section ten of the Minnesota Constitution, because it was unreasonable under the Fourth Amendment."). Thus, a separate Minnesota Constitutional analysis is unnecessary.

D. The good faith exception saves the evidence

If this Court concludes the affidavit or Order lacked probable cause, the good-faith exception saves the evidence under the Fourth Amendment analysis. Appellant argues the cell phone record data must be excluded under the Fourth Amendment.[15] *See* App.Br.15-18, 24-29. But the U.S. Supreme Court has applied the good faith exception to the exclusionary rule when police reasonably rely upon court orders, like search warrants, to obtain evidence. *See United States v. Leon*, 468 U.S. 897, 920-22 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984). Federal circuit courts have dutifully followed that precedent. *See, e.g., United States v. Carpenter*, 341 F.3d 666, 667-73 (8th Cir. 2003) (warrant signed by Minnesota state court judge, evidence saved by *Leon* good faith exception).

The exclusionary rule's "sole purpose…is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-37 (2011). Thus, when officers "act with an objectively reasonable good-faith belief that their conduct is lawful," the exclusionary rule will not apply. *Id.* at 238 (quotes omitted). An officer acts with objectively reasonable good-faith when conducting a search "in reasonable reliance on subsequently invalidated statutes." *Id.* at 239.

Since *Carpenter* was decided in June 2018, federal courts addressing federal constitutional challenges to the Government obtaining cell phone records have

[15] Since a separate Minnesota Constitutional argument—with greater protections—has not been made, U.S. Supreme Court precedent analyzing the Fourth Amendment is controlling. *State v. Brist*, 812 N.W.2d 51, 54 (Minn. 2012).

overwhelmingly declined to suppress evidence arising out of a pre-*Carpenter*, routine acquisition of cell site location information pursuant to the Stored Communications Act. *See, e.g.*, *United States v. Chambers*, -- Fed. Appx. --, 2018 WL 4523607, at *1-*4 (2nd Cir. Sept. 21, 2018) (post-*Carpenter* concluding "good faith exception applies here so that suppression of the cell-site records at issue was not constitutionally required"); *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018) (good faith exception applied where "investigators...reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records"); *United States v. Christian*, 737 Fed. Appx. 165, 166 (4th Cir. 2018) (same); *United States v. Joyner*, 899 F.3d 1199, 1204-05 (11th Cir. 2018).[16]

The fact this Court has not yet adopted the *Leon* good-faith exception when the police act pursuant to a valid court order[17] is irrelevant for Fourth Amendment purposes. The U.S. Supreme Court jurisprudence is binding for the Fourth Amendment interpretation. *Brist*, 812 N.W.2d at 54. Thus, under Supreme Court's precedent, the evidence should be admitted under the good faith exception because the phone records were properly obtained in 2015. *Leon*, 468 U.S. at 920-22.

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[16] *United States v. Blake*, No.3:16-CR-111, 2018 WL 3974716, at *2 (D. Conn. Aug. 20, 2018) (following five federal district courts and the Fourth Circuit Court of Appeals to conclude suppression is not warranted); *United States v. Wright*, 339 F. Supp. 3d 1057, 1057-58 (D. Nev. 2018); *United States v. Coles*, No.1:16-CR-212, 2018 WL 3659934, at *2 (M.D. Pa. Aug. 2, 2018); *United States v. Williams*, No.2:17-CR-20758, 2018 WL 3659585, at *2-*3 (E.D. Mich. Aug. 2, 2018); *United States v. Chavez*, No.15-CR-00285, 2018 WL 3145706, at *5-*6 (N.D. Cal. June 26, 2018); *Reed v. Commonwealth*, 819 S.E.2d 446, 449-50 (Va. Ct. App. 2018).

[17] *State v. Lindquist*, 869 N.W.2d 863, 877 (Minn. 2016).

This Court has not yet adopted the *Leon* good-faith warrant exception for purposes of the Minnesota Constitution. *Lindquist*, 869 N.W.2d at 877. But this Court favors uniformity with the U.S. Supreme Court's interpretation of the U.S. Constitution because it results in "consistency of practice in state and federal courts." *Kahn v. Griffin*, 701 N.W.2d 815, 824-25 (Minn. 2005).

If *Leon* is rejected for purposes of Minnesota's Constitution, the practice in state and federal courts would be far from consistent. The application of the good-faith exception based on a facially valid warrant signed by a Minnesota state district court judge would depend entirely upon whether charges were filed in federal court versus state court. In federal court, evidence would be saved if the police reasonably acted pursuant to a state court judge's signed warrant. *United States v. Trejo*, 632 Fed. Appx. 877, 880 (8th Cir. 2015) (evidence admitted under good-faith exception; Hennepin County state judge signed warrant); *Carpenter*, 341 F.3d at 667, 673 (evidence admitted under good-faith exception; warrant issued by Ramsey County state judge). If the good-faith warrant exception is rejected for Minnesota's Constitution, that same evidence would be excluded simply because charges were filed in state court. In line with *Leon* and in the interest of consistency, the good-faith warrant exception should equally apply to Minnesota's Constitution.

II. The district court did not err or abuse discretion in denying the motion to exclude the cell phone evidence or expert testimony

A. *Frye-Mack* standards and standard of review

1. *Frye-Mack* standards

If a party seeks to offer "novel scientific evidence[,]" the district court must conduct a *Frye-Mack* analysis to determine the admissibility of the evidence. *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000). First, the court must determine whether the evidence is "generally accepted in the relevant scientific community." *Id.* The evidence must further have a foundational reliability, which requires the test be reliable and "its administration in the particular instance conformed to the procedure necessary to ensure reliability." *Id.* (quotes omitted). And, as with all expert testimony, the evidence must satisfy the requirements dictated by the Rules of Evidence: "be relevant, be given by a witness qualified as an expert, and be helpful to the trier of fact." *Id.* (citing Minn. R. Evid. 402 and 702).[18]

[18] Defense counsel below moved to suppress the admission of the expert's testimony in addition to raising the *Frye-Mack* challenge. Index #61-63, 79, 85. The district court denied both arguments in the same Order. Add.6-43. In denying the expert arguments, the court analyzed Minn. R. Evid. 702 and concluded the expert was qualified, his opinion had foundational reliability, and his testimony would be helpful to assist the jurors in determining the facts at issue. Add.28-38. With the exception of the foundational reliability holding, which overlaps both the Rule 702 and the *Frye-Mack* analysis, Appellant has not challenged the lower court's expert-specific ruling on appeal. App.Br.30-41. Thus, there is no dispute that (1) the FBI Agent was qualified (Add.29-30), or (2) the Agent's testimony was helpful to the jury to resolve fact issues in the case (Add.37-38).

2. Standard of review

Whether a particular principle or technique satisfies the first *Frye-Mack* prong – general acceptance in the relevant scientific community – is reviewed *de novo*. *Goeb*, 615 N.W.2d at 814-15. A court's foundational reliability determination (second *Frye-Mack* prong) is reviewed for an abuse of discretion. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012); *State v. Loving*, 775 N.W.2d 872, 877 (Minn. 2009). Similarly, the adequacy of foundation offered for an expert witness's testimony will not be reversed absent an abuse of discretion. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 529 (Minn. 2007).

B. The exhibits and expert testimony was not "novel scientific evidence" such that *Frye-Mack* applied

This Court requires a *Frye-Mack* analysis only "when novel scientific evidence is offered[.]" *Goeb*, 615 N.W.2d at 814. If the evidence is not "novel" or "scientific," then the expert's testimony is analyzed solely under the Rule 702 requirements. *Id.*; Minn. R. Evid. 702; *State v. Nystrom*, 596 N.W.2d 256, 259 (Minn. 1999). The district court's Rule 702 conclusions are not challenged on this appeal. *See* Add.28-38; App.Br.30-41. Thus, if *Frye-Mack* does not apply, the admission of the expert cell phone evidence must be affirmed.

The cell phone location data and testimony did not constitute "novel scientific evidence" such that a *Frye-Mack* analysis was necessary. *Goeb*, 615 N.W.2d at 814. The district court concluded as much, holding the evidence "appears to be well-established, and is hardly novel or emerging." Add.40. The court further

held such evidence was not "scientific," but instead "appears more of a matter of law enforcement investigatory and evidence-gathering technique than even something that might be characterized as forensic science, like DNA[.]" *Id.*

1. The evidence was not "novel"

"Novel" is defined as "not resembling something formerly known : having no precedent : new." *Webster's Third New International Dictionary Unabridged* 1546 (1986); *see also The American Heritage Dictionary of the English Language* 1207 (5th ed. 2011) (defining "novel" as "Strikingly new, unusual or different"); *State v. Roman Nose*, 649 N.W.2d 815, 821 (Minn. 2002) (technique is novel if it differs from previously accepted methods). The cell phone location data was hardly "novel or emerging" (Add.40), much less "new," "not resembling something formerly known," or "having no precedent." Rather, this type of evidence has been routinely admitted in Minnesota courts for over a decade. *See, e.g.*, *State v. Webster*, 894 N.W.2d 782, 784 (Minn. 2017) ("Location data supplied by … cell-phone usage and cell-tower records indicated that his phone was near the location of the murder in the early morning hours of September 21, 2014."); *State v. Onyelobi*, 879 N.W.2d 334, 341 (Minn. 2016) ("Cell tower data further confirmed that the call from the 208 phone number was made in the area where police found [decedent's] body.").[19]

[19] *See also State v. Mosely*, 853 N.W.2d 789, 795 (Minn. 2014) ("cell tower records … show[ed] that M.T.'s cell phone travelled between St. Louis and Brooklyn Park on the dates in question"); *State v. Griffin*, 834 N.W.2d 688, 691 (Minn. 2013) ("the records showed that the phone 'was turned on, it was being used, and that it was hitting off cell site towers that [we]re in the proximity of where the murder happened' at the time the shots were fired."); *State v. Milton*, 821 N.W.2d 789, 795

As far back as 2006, this Court described the technology: "[c]ell phones operate by bouncing signals off 'cell towers.'" *Tran*, 712 N.W.2d at 545, n.3. In *Tran*, the cell phone records indicated calls—made in December 2003—were processed through a certain tower, implying the defendant was in the neighborhood of a certain home when the calls were made. *Id.* at 543-45. Cell phone location evidence has been used in Minnesota courts for well over a decade.

Further, the FBI Special Agent testified that he had used the location data technology / methodology since his Army tours in Iraq in 2003 and 2006. 9/15/17 T.7-8. He thereafter used the same techniques while working for the National Security Agency and the FBI. 9/15/17 T.7-10.

(Minn. 2012) ("All of these calls 'bounc[ed] off the same [cell phone] tower' near the vicinity of the shooting."); *State v. Davis*, 820 N.W.2d 525, 529 (Minn. 2012) ("The last call to [one phone] from [another] phone was made at 8:01 p.m., and was routed through a cell tower a few blocks from the crime scene."); *Bobo v. State*, 820 N.W.2d 511, 513 (Minn. 2012) ("Phone records revealed that 5 minutes before the shooting, … cell phone triggered a cell tower one block from the crime scene."); *State v. Hawes*, 801 N.W.2d 659, 667 (Minn. 2011) (cell tower placed phone near a residence); *Francis v. State*, 781 N.W.2d 892, 895 (Minn. 2010) (cell phone calls "were processed through a cell-site tower located within the general area of the shooting"); *State v. Matthews*, 779 N.W.2d 543, 547 (Minn. 2010) (records revealed "cell phone accessed a tower … in St. Paul in the late afternoon and then the cell phone accessed a Minneapolis tower" at night); *State v. Bobo*, 770 N.W.2d 129, 135 (Minn. 2009) (cell phone records showed phones "triggered some of the same towers and placed them both in the general vicinity of [a bar] around the time of the murder"); *Francis v. State*, 729 N.W.2d 584, 589-91 (Minn. 2007) (affirming conviction where cell tower records placed defendant in general area of shooting, and rejecting argument that cell phone evidence was unreliable); *State v. Mayhorn*, 720 N.W.2d 776, 781 (Minn. 2009) (records showed cell phone locations and the phone in Moorhead "around the time of the murder"); *State v. Tran*, 712 N.W.2d 540, 545 (Minn. 2006) (cell phone location data put the defendant in a certain neighborhood at a specific time); *State v. Leake*, 699 N.W.2d 312, 316 (Minn. 2005) (cell phone tower records demonstrated calls in specific areas at specific times).

The district court cited a California Court of Appeals decision, which similarly concluded that "determining the general location of a cell phone based on which sector of the particular cell tower to which that phone's signal connected cannot be considered a 'new scientific methodology.'" *People v. Garlinger*, 203 Cal. Rptr.3d 171, 179-80 (Cal. Ct. App. 2016); Add.40. Cell phones operate much like radio signals from one place to another, which "is technology that has been around for more than a century." *Id.*

At a minimum, the cell phone location evidence "resembl[es] something formerly known" and "having … precedent[.]" *Webster's Third New International Dictionary Unabridged* 1546 (1986). Thus, the evidence was not "novel."

2. The evidence was not "scientific"

The district court further determined the evidence was not "scientific." Add.39-40. Instead, the court appropriately characterized the Agent's testimony as "technical" or "specialized applied knowledge." *Id.* And rather than involving some specific "scientific community," the court properly deemed the evidence to be more akin to "law enforcement investigator and evidence gathering" techniques. Add.40. Thus, "scientific" evidence was not offered.

3. *Frye-Mack* is inapplicable

Since the evidence the State sought to introduce was neither "novel," nor "scientific," the district court properly denied Appellant's motions. Add.38-40. *See also Jacobson*, 728 N.W.2d at 528-29 (no *Frye-Mack* analysis needed for dog sniffs because the technique "is neither emerging nor scientific").

C. If *Frye-Mack* applies to the cell phone location evidence, the district court neither erred, nor abused discretion in denying the motion

Although the cell phone location evidence was neither novel, nor scientific, the district court addressed *Frye-Mack* – "assuming *arguendo*" – that analysis applied to the expert testimony. Add.41. The court properly concluded the techniques were generally accepted in the law enforcement and cellular phone industry communities. Add.41-37. The court further did not abuse discretion in determining the evidence had a foundational reliability. Add.30-37, 42-43.

1. The court did not err in concluding the evidence satisfied the first *Frye-Mack* prong: general acceptance

Appellant's "general acceptance" argument hinges on the contention that the FBI Special Agent is not a scientist or an engineer. App.Br.30, 33-36. Defense counsel below conceded that drive testing is generally accepted in the engineering community, but argued the technique was solely used to improve a cell phone company's network. Index #85. But this is precisely why the court concluded the methodology was generally accepted. Add.41-42.

Agent Berni used "drive testing" to determine the scope of the cell phone network. 9/15/17 T.28-34, T.47-48, T.78-79. Agents would drive every street with an antenna that would accurately determine the range of each cell tower. *Id.* The agents' drive test determined the reach of each cell tower, which is exactly what the phone company does to improve its network. *Id.*; 9/29/17 T.18. Thus, the general acceptance in the engineering community confirms the "general acceptance" of the FBI's technique to determine the range of a cell tower. *Goeb*, 615 N.W.2d at 814.

As for the cell phone records, the Agent testified there is no error rate. 9/15/17 T.18. If the phone connects to the phone network, there is a record of the activity. *Id.* If a phone does not connect to the network, there is no record. *Id.*

Special Agent Berni further testified the technology and application is "extremely" accepted in the community. 9/15/17 T.23-23. The phone records and cell phone tower range are both accurate because companies use the same data to optimize their network, keep track of towers / sectors, and do not want to lose customers. *Id.* Phone companies are also required by law to have location information in case a 911 call is interrupted or dropped so the 911 operator knows where to send emergency services. 9/15/17 T.25.

The technology was also accepted in the military community to track targets (9/15/17 T.29), the FBI and law enforcement community to find suspects, fugitives, lost children, or Alzheimer's patients (9/15/17 T.17, T.19, T.21-23, T.27, T.47-48), as well as in the engineering community (9/15/17 T.56; 9/29/17 T.12-13, T.18, T.26). At a minimum, the methodology is "widely accepted" in the field to which it belongs. *State v. Fenney*, 448 N.W.2d 54, 57 (Minn. 1989); 9/15/17 T.23-24, 27, 29, 31-32, 43, 51, 57; *see also United States v. Frazier*, No.2:15-CR-044, 2016 WL 4994956, at *2 (D. Nev. Sept. 16, 2016) (citing cases recognizing drive testing generally accepted by recognized authorities).

The district court did not err in concluding the evidence and expert testimony was "generally accepted."

2. The court did not abuse discretion in determining the evidence met the second *Frye-Mack* prong: foundational reliability

The district court determined that the FBI Special Agent's methods in the instant case complied with the appropriate standards. Add.30-37, 42-43. Appellant insists that the test was not proved to be reliable because the Agent's "theories had never been tested in a scientific way[.]" App.Br.37. The "foundational reliability" test, however, requires simply (1) the test itself have foundational reliability, and (2) "its administration in the particular instance conformed to the procedure necessary to ensure reliability." *Goeb*, 615 N.W.2d at 814.

Special Agent Berni's testimony established that the methodology he used was reliable. The cell phone records, themselves, regarding a phone's connection to a tower / sector cannot be disputed. If a cell phone connects to a network, a record of that connection exists, which indicates the tower and sector through which the phone accessed the network. 9/15/17 T.18. If a cell phone does not connect, there is no record. *Id.* There is no "error rate" – a record exists or it does not. *Id.*

In addition, cell phone companies use the same "drive test" data to determine their network coverage to ensure customers do not have areas where calls are dropped. 9/15/17 T.23-25; Add.31. The cell phone companies are further required, by law, to maintain information for 911 calls in order to locate individuals if a call is lost or the person is non-responsive. 9/15/17 T.25; Add.31.[20]

[20] Appellant attacks the district court's finding that cell phone companies are required, by law, to provide location information from a phone if a 911 call is dropped. App.Br.38; Add.31-32; 9/15/17 T.25. Appellant contends this belief is

Agent Berni further testified the test is performed by the Army, the NSA, and the FBI. 9/15/17 T.5-9; Add.30. The FBI considers this method to be an "extremely accurate technique[.]" 9/15/17 T.19, T.27, T.57; Add.31. FBI special agents who conduct this analysis have been involved in more than 3,000 criminal investigations and provided expert testimony in more than 1,000 trials. 9/15/17 T.9; Add.31. The district court cited numerous cases in which this evidence and testimony had been found reliable by other courts. *See* Add.32-35 (citing cases[21] and publications[22]). Special Agent Berni, himself, had testified as an expert using these methodologies in a previous Hennepin County trial as well as in federal court. 9/15/17 T.27.

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unsupported by empirical evidence. App.Br.38. But that is not the standard. The Special Agent's testimony, by itself, is sufficient to support the court's factual finding, which is not clearly erroneous. *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003). In addition, the law does, in fact, require phone companies to provide call location information to emergency dispatch providers. 47 U.S.C. § 222(d)(4). Further, defense counsel offered no evidence to rebut the testimony from an FBI Special Agent had 400 hours of specialized training and passed an exam to become certified, is recertified yearly, has used the methodology in numerous investigations, testified in several cases, used the technology on tours in Iraq to track targets, and used the method while working for the NSA. 9/15/17 T.7-13, T.27, T.29.

[21] *See, e.g.*, *United States v. Lewisbey*, 843 F.3d 653, 659 (7th Cir. 2016) ("call records and cell towers to determine the general location of a phone at specific times is a well-accepted, reliable methodology"); *United States v. Hill*, 818 F.3d 289, 295-99 (7th Cir. 2016) (courts "almost universally" admitted historical cell-site analysis); *see also United States v. Geddes*, 844 F.3d 983, 992 (8th Cir. 2017) (affirming verdict, in part, on cell phone site location data).

[22] Appellant decries the articles the lower court cited are not "in a peer-reviewed scientific journal." App.Br.39; *see also* Add.32. Appellant offered no evidence or contrary publications to dispute the cited articles or their accuracy. Add.32; 9/15/17 T.56-57. Moreover, the Agent's specific testing in this case was, in fact, peer reviewed. 9/15/17 T.32. Every time Special Agent Berni analyzes cell phone records to produce cell phone location evidence, his product must be peer reviewed by another certified Agent before it can be considered final. *Id.* That same peer review was employed for the evidence and testimony in this case. *Id.*

In this particular instance, Agent Berni followed the methodology he had performed more than 200 times in the past. 9/15/17 T.15; Add.30. He conducted the drive test surrounding the streets of the cell tower to determine the tower's range. 9/15/17 T.29-32, T.78-79; Add.30-31. He then combined the drive test data with the cell phone records to determine the general location of Harvey's cell phone at various times shortly before and after the shootings. 9/15/17 T.36, Ex.2; Add.30. Thereafter, Agent Berni submitted his analysis to internal peer review to another member of the FBI's cellular analysis survey team, who independently reviews the data before the analysis can be considered final. 9/15/17 T.32; Add.31.

Finally, the court properly concluded the evidence the defense solicited from its witness and in cross examination of Special Agent Berni—regarding weather, animals, and other potential interference—goes to the weight of evidence, which is a jury question. Add.35-37. It does not go to admissibility. *Id.*; *Loving*, 775 N.W.2d at 878 ("argument about the inadequacy of the test's meaning is an argument about the weight of the evidence, not the reliability of the evidence.").

The court did not abuse discretion in concluding the evidence had foundational reliability. Add.30-37, 42-43. This Court should affirm.

III. The trial court properly denied Appellant's *Batson* challenge

A. Three-step *Batson* test and standard of review

Prospective jurors who cannot be fair are subject to removal for cause. *State v. Reiners*, 664 N.W.2d 826, 833 (Minn. 2003). Unlike removal for cause, "[p]eremptory challenges allow a party to strike a prospective juror that the party believes will be less fair than some others and, by this process, to select as final jurors the persons they believe will be most fair." *Id.*

The Equal Protection Clause prohibits the use of peremptory challenges of potential jurors solely because of their race. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986). Courts use a three-step analysis to determine whether a peremptory strike was motivated by racial discrimination. *State v. Onyelobi*, 879 N.W.2d 334, 345 (Minn. 2016). First, the party challenging the peremptory strike bears the burden of making "a prima facie case showing that the [striking party] exercised its peremptory challenge against a prospective juror on the basis of race." *Id.* Second, the party who exercised the peremptory challenge must articulate a race-neutral reason for the challenge. *State v. Wilson*, 900 N.W.2d 373, 378 (Minn. 2017). Third, if a valid race-neutral explanation is tendered, the court must then decide whether "the proffered reason was merely a pretext for the party's true motive: purposeful discrimination." *Id.* (quotes omitted).

A district court's *Batson* ruling is afforded "great deference" and will not be reversed unless it is clearly erroneous. *Id.* Such deference is granted because the analysis is a "factual determination," and the record may not reflect all "relevant

circumstances that the court may consider." *State v. Martin*, 773 N.W.2d 89, 101 (Minn. 2009). The trial court "occupies a unique position to observe the demeanor of the prospective juror and evaluate the credibility of the party that exercised the peremptory challenge[.]" *State v. Diggins*, 836 N.W.2d 349, 355 (Minn. 2013).

Even if the Court concludes that the trial court's analysis of the *Batson* factors fell short, this Court can independently examine the record and consider each factor separately to determine if a constitutional error occurred during jury selection. *State v. Pendleton*, 725 N.W.2d 717, 726-27 (Minn. 2007).

B. Jury selection proceedings, *Batson* challenge and ruling

Jury selection took several days, with both sides striking various veniremembers. T.1-T.760. Defense counsel struck several African American individuals. *See* T.190, T.361. The State struck several jurors who expressed negative views of police officers. *See* T.264-65, T.305-29, T.473-T.502, T.732-34.

The juror (#18) that was the subject of defense's *Batson* challenge was an African American man who had been robbed at gunpoint and knew someone that had been shot. T.329, T.342-43. The veniremember stated "this particular case brings a lot of things close to home to me that may make my mind run in different directions instead of staying on the path that, you know, that the prosecutor and the defendants are trying to get me to see[.]" T.339. The potential juror agreed it would not be fair if, when hearing testimony, he was distracted by his life. T.340.

Juror #18 also expressed negative feelings about police, describing encounters he had experienced. T.345-46. He also felt officers would lie if it were

in their best interest. *Id.*, T.347 ("if it was in the police officer's best interest to lie, I don't think he would have a problem in telling a falsehood."). He further believed officers would lie for other officers that they do not even know, and referred to the police as "a gang." T.347. Defense counsel passed the juror for cause. T.352.

The prosecutor asked Juror #18 a few questions. T.352-58. The potential juror reiterated his belief that police officers "will cover for one another" by lying. T.356. The State exercised a peremptory strike. T.358.

Defense counsel raised a *Batson* challenge. T.359. The trial court asked for defense's prima facie showing, noting there is already one African-American on the jury. T.360. The court emphasized defense had to prove: (1) a protected racial group had been peremptorily struck (which had been shown), and (2) "the circumstances of the case raise an inference that the exclusion was based on race." T.360. Counsel noted that the defendant was "clearly a person of color." *Id.* The court responded that fact goes to the first half of the showing, but not the second. T.360-61.

After listening to the defense's reasoning, the trial court turned to the State. T.361. The prosecutor noted defense had struck three minority veniremembers before Juror #18. *Id.* The prosecutor argued his race-neutral reason: the "bottom line is … he does not find police officers as credible as other individuals. He said it twice." T.361-62. Juror #18 also thought everybody had been robbed. T.362. The prosecutor "didn't like that answer[,]" which was another race-neutral reason. *Id.*

The State further responded to defense counsel's argument (that many African Americans do not like the police), by pointing to another potential African

American juror who—based on his questionnaire responses—appeared to disagree with counsel's contentions. T.362. The prosecutor also noted the African American woman who was already on the jury also "felt differently" about the police from Juror #18. T.362. Both African American jurors ultimately deliberated and agreed with the verdict. *Id.*; T.437-41; T.1480.

The trial court agreed that "unfortunately a lot of African-Americans in our city tend to have a disproportionate number of bad experiences with police." T.362. But the court ruled defense failed to make a prima facie showing. T.362-63. The judge noted the State's request to peremptorily exclude Juror #18 "was based on his very specific comments about, police lie and they would lie to help another cop" even if the officer did not know the other officer. *Id.* The trial court also ruled the State had provided race-neutral reason to exclude the veniremember "based on his comments about police and about how he would evaluate police credibility." *Id.* The court denied the *Batson* challenge and allowed the strike. *Id.*

C. No clear error in denying the *Batson* challenge

1. First step: prima facie showing met

The prima facie case of purposeful discrimination must be made by showing (1) a member of a racial minority has been peremptorily excluded, and (2) the "circumstances of the case raise an inference that the exclusion was based on race." *Reiners*, 664 N.W.2d at 831 (quotes omitted). The "mere fact that the veniremember subject to the strike is a racial minority does not establish a prima facie case of discrimination." *Angus v. State*, 695 N.W.2d 109, 117 (Minn. 2005).

The trial court ruled no "prima facie case" was made. T.362-63. Although Juror #18 is an African American that the State peremptorily struck, the "circumstances of the case" did not "raise an inference that the exclusion was based on race." *Reiners*, 664 N.W.2d at 831. A party "must prove that the real reason was racial discrimination by identifying some circumstance that raises an inference of discrimination." *Angus*, 695 N.W.2d at 118. Whether an inference of discrimination is raised depends, in part, on the races of the defendant and the victim. *Id.* at 117.

Defense counsel's reason for the *Batson* challenge was that Harvey was African American. T.359-61. The defense attorney made no argument to connect Juror #18's race with the facts of the case in order to raise an inference that the State's strike was the result of purposefully discrimination. *Id.*

The circumstances of the case, in fact, are that the defendant and the victims were African American. In such situations, there are "no racial overtones to the case since both the defendant and the victim" are the same race. *State v. Stewart*, 514 N.W.2d 559, 563 (Minn. 1994); *see also Angus*, 695 N.W.2d at 117 ("the general desire to achieve a diverse jury cannot be the basis to sustain a *Batson* objection where the circumstances of the case do not support an inference that the party exercising the strike has a discriminatory motive."); *State v. Everett*, 472 N.W.2d 864, 868-69 (Minn. 1991).

Appellant contends that Juror #18's experience as a crime victim and having a friend murdered established an "inference" that discrimination occurred. App.Br.49-50. But those experiences do not equate to a racial connection to the

circumstances of the case. *Angus*, 695 N.W.2d at 117.[23] Indeed, even if those events somehow "related to [his] experience as a racial minority, this does not render the strike race-based." *State v. Bailey*, 732 N.W.2d 612, 621 (Minn. 2007).

Moreover, the State had already accepted one prospective African American juror who had not expressed views that police lie or will fabricate a story in order to protect another officer they do not know. T.360-62; *see also* T.346-47.[24] Thus, these circumstances do not establish a prima facie case of racial discrimination. *See Wilson*, 900 N.W.2d at 382 ("[B]ecause the State accepted one black juror, we conclude that Wilson cannot demonstrate he has met the required [prima facie] standard."); *Everett*, 472 N.W.2d at 869 (noting significance "that the jury ultimately included a member of a minority").

Since defense failed to establish a prima facie case of purposeful discrimination, the court did not clearly err in concluding that no had been no "prima facie showing." T.363. This Court need not address the remaining factors.

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[23] Contrary to Appellant's reasoning that Juror #18's experiences and answers made for "an ideal prosecution juror" (App.Br.49-50), the prosecutor specifically noted that he did not like Juror #18's answer about his being a victim of a robbery at gunpoint was not a big deal because everybody had been robbed. T.362. Thus, the "inference" the State struck Juror #18 because of his race (App.Br.50) is not supported by the record. T.362.

[24] The prosecutor later accepted another African American veniremember who did not share the same negative views of the police. T.362, T.437-41, T.1480.

2. Second step: the articulated reason was race-neutral

Although the trial court denied the ruling based upon no prima facie case of purposeful discrimination, the court also noted that the State had "provided a race-neutral reason to exclude him based on his comments about police and about how he would evaluate police credibility." T.363. The court did not clearly err in ruling the State had offered a race-neutral reason for the strike. *Id.*

The prosecutor articulated the race-neutral reason as being Juror #18's belief that officers were not as credible as other individuals. T.361-62. Appellant contends this is not a "race-neutral reason." App.Br.51-53. But Juror #18, indeed, had expressed his feelings that police officers lie, and would lie to protect an officer they do not even know. T.346-47, T.356. The potential juror went so far to compare the police—and the "blue code"—to "a gang." T.347. This is not simply a matter of statistical African American "distrust" of police officers. App.Br.51-53. This is a prospective juror's repeated belief that officers will lie for one another, even to protect others they do not know; like "a gang." T.346-47, T.356.

Notably, Appellant's statistics about African Americans' distrust of police and in an "officers' veracity" (App.Br.41-43) was not shared by the two African American jurors who did serve, deliberate, and find Appellant guilty. *See* T.362, T.437-41; T.1479-80. Thus, statistics cannot be sweepingly used to show the prosecutor had racially motivated reasons to strike Juror #18. *Bailey*, 732 N.W.2d at 621 (experience as a racial minority does not render the strike race-based).

The race-neutral explanation "need not be persuasive or even plausible." *Martin*, 773 N.W.2d at 101. The explanation offered here, however, was both persuasive and plausible: this particular juror repeatedly stated his belief that police officers will lie. Thus, the trial court did not clearly err in finding the prosecutor had provided race-neutral reasons for the strike. T.363; *Wilson*, 900 N.W.2d at 378.[25]

3. Third step: no pretext of purposeful discrimination

The pretext decision ultimately "comes down to whether the trial court finds the [attorney's] race-neutral explanations to be credible." *Reiners*, 664 N.W.2d at 836-37 (quotes omitted). The trial court did not rule on step three. T.362-63. But even if this Court were to determine that the trial court's prima facie ruling or race-neutral finding were insufficient, it can independently examine the record and consider the final *Batson* factor separately. *Pendleton*, 725 N.W.2d at 726-27.

Harvey bears the burden to demonstrate that the race-neutral reason was "pretextual of an underlying motive to discriminate." *Angus*, 695 N.W.2d at 117. This step requires Harvey to establish "the proffered reason was merely a pretext for the party's true motive: purposeful discrimination." *Wilson*, 900 N.W.2d at 378.

[25] Additionally, if the court exercises *de novo* review to look beyond the trial court's ruling (*Pendleton*, 725 N.W.2d at 726-27), Juror #18 also expressed concern about being able to concentrate on this particular case given his personal experiences with robbery and murder. T.329-43. A juror's inability to concentrate due to similar personal experience as the crime at issue would provide a further race-neutral reason justifying the strike. *Martin*, 773 N.W.2d at 101; *Wilson*, 900 N.W.2d at 378.

But, like in *Angus*, Appellant has not identified a race-based reason for the strike (*Batson* step one). 695 N.W.2d at 118. Thus, there is no identifiable "circumstance that would supply the required inference that the real reason was racial discrimination." *Id.*

Besides that, the prosecutor's concern about Juror #18 fairly evaluating the evidence, including police officer testimony, were valid since the prospective juror (at least twice) expressed the views that police officers lie to protect one another. T.349-47, T.356, T.361-62. A prospective juror's negative experiences with police is a valid and race-neutral reason for exercising a peremptory challenge because such a person could be unduly sympathetic to a criminal defendant. *Martin*, 773 N.W.2d at 103-04; *Bailey*, 732 N.W.2d at 620-21.

The prosecutor also articulated the concern that the juror had thought his experience of having been robbed at gunpoint was not significant and it happens to everyone. T.362; T.344. Juror #18 further noted "if it was a case without a robbery or murder … I probably would be less … bringing personal feelings into it." T.344. He had previously noted "this particular case"—involving charges of robbery and murder—"brings a lot of things close to home to me that may make my mind run in different directions[.]" T.339. The prosecutor "didn't like that answer" that about the juror's robbery experience. T.362. Thus, the record demonstrates the race-neutral reason was not pretext. T.339, T.344.

Further, Appellant cannot show the State's proffered justification for striking the juror of one race applied equally to a similar prospective juror of a different race

who served on the jury. *Bailey*, 732 N.W.2d at 618. In fact, the prosecutors struck jurors of different races who expressed the same negative or mixed views towards police officers. *See, e.g.*, T.264-65, T.305-29. When people did not express those negative views, they served on the jury – no matter their race. *See, e.g.*, T.346-47, T.360-62 (one African American juror on panel before strike of Juror #18), T.362, T.437-41, T.1480 (second African American person also served).

"*Batson* does not require a prosecutor to show that a prospective juror is completely unfit for service; it only forbids a prosecutor from striking a juror based on her race." *Bailey*, 732 N.W.2d at 620-21. The State had legitimate, non-discriminatory reasons to suspect that Juror #18 might be less fair than other jurors. This is precisely why the law grants parties the right to exercise peremptory challenges. A careful, independent review of the record provides an alternative basis to affirm the district court's ruling that no *Batson* violation occurred.

IV. The pro se supplemental brief raises no meritorious issues

In his supplemental brief, Appellant essentially repeats the issues raised by his appellate attorney. Supp.Br.1-8. This Court should affirm. *See supra* I. and II.

The slight twist on Appellant's argument is his claim defense counsel was ineffective for failing to seek judgment of acquittal or dismissal of the indictment due to the cell phone data / *Frye-Mack* issues. *See* Supp.Br.2-8. Appellant further contends the prosecutor committed misconduct by using the cell phone evidence. *Id.* These issues do not substantially differ from the merits of appellate counsel's brief, but the State will, nonetheless, briefly respond.

The record shows Appellant's counsel waged a vigorous defense, particularly in relation to the cell phone data evidence and testimony. *See, e.g.*, Index #50-52, 55, 61-63; 9/15/17 T. & 9/29/17 T. At a bare minimum, defense counsel's strenuous objections and motion practice demonstrate "an attorney exercising the customary skills and diligence that a reasonable competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). The fact the court rejected counsel's arguments and permitted the evidence does not make the trial attorney's performance "insufficient."

Similarly, Appellant's claims of unobjected-to prosecutorial misconduct for using the evidence falls short. Supp.Br.2-8. The prosecutors simply used evidence—at the grand jury proceedings and at trial—that the presiding judge allowed. No misconduct was committed by presenting evidence the court ruled was admissible.

CONCLUSION

Respondent respectfully requests this Court to affirm.

DATED: January 14, 2019

Respectfully submitted,

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A18-0205
STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

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Nigeria Lee Harvey,

Appellant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 11,131 words. This brief was prepared using Microsoft Word 2016, Times New Roman font face size 13.

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